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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5072

SHIRLEY DAVIS, *Petitioner*,

v.

OTTO E. PASSMAN, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF
THE HONORABLE MORRIS UDALL, THE HONORABLE PATRICIA SCHROEDER, THE HONORABLE CHARLES ROSE, WINNIE BURRELL, CARLA KISH, BRUCE KRIEGMAN, THE HONORABLE LES AUCOIN, THE HONORABLE BERKLEY BEDELL, THE HONORABLE DAVID E. BONIOR, THE HONORABLE WILLIAM M. BRODHEAD, THE HONORABLE GEORGE E. BROWN, JR., THE HONORABLE JOHN H. BUCHANAN, JR., THE HONORABLE YVONNE BRATHWAITE BURKE, THE HONORABLE ROBERT CARR, THE HONORABLE JOHN CONYERS, THE HONORABLE RONALD V. DELLUMS, THE HONORABLE THOMAS DOWNEY, THE HONORABLE ROBERT F. DRINAN, THE HONORABLE DON EDWARDS, THE HONORABLE DANTE B. FASCELL, THE HONORABLE DALE E. KILDEE, THE HONORABLE WILLIAM LEHMAN, THE HONORABLE EDWARD J. MARKEY, THE HONORABLE GEORGE MILLER, THE HONORABLE ANTHONY MOFFETT, THE HONORABLE RICHARD NOLAN, THE HONORABLE LEON PANETTA, THE HONORABLE DON J. PEASE, THE HONORABLE FRED RICHMOND, THE HONORABLE BRUCE F. VENTO, THE HONORABLE HAROLD L. VOLKMER, AND THE HONORABLE TED WEISS,
AMICI CURIAE, IN SUPPORT OF REVERSAL

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AMICI CURIAE, IN SUPPORT OF REVERSAL

Twenty-nine Members and three employees of the United States House of Representatives submit this brief as *amici curiae* in support of petitioner's claim that the en banc decision of the United States Court of Appeals for the Fifth Circuit, entered on April 18, 1978, should be reversed. Both parties to this action have given their written consent to the filing of this brief pursuant to Rule 42(b) of the Rules of this Court. Copies of the letters of consent have been filed with the Clerk and are appended to this brief.

STATEMENT OF THE CASE

Petitioner served from February 1, 1974 through July 31, 1974 as the Deputy Administrative Assistant to respondent, who was then a member of the House of Representatives. Respondent terminated petitioner's employment, explaining in a letter that "it was essential that the understudy to [his] Administrative Assistant be a man." (A. 6-7)

Petitioner filed suit in the United States District Court for the Western District of Louisiana, alleging sex discrimination in violation of the fifth amendment to the United States Constitution. The district court, in an unreported decision, dismissed the suit on the grounds that respondent's action did not violate the fifth amendment and that petitioner did not have a private right of action. The district court held, however, that petitioner's suit was not barred by immunity doctrines. (A. 9-10)

A panel of the United States Court of Appeals for the Fifth Circuit reversed the dismissal of petitioner's suit. The panel held that petitioner had alleged a constitutional violation, that she had a private right of action, and that no doctrine of immunity prohibited

petitioner from filing her suit. *Davis* v. *Passman*, 544 F.2d 865 (5th Cir. 1977).

The Fifth Circuit, sitting en banc, reheard the case and reversed the panel's decision. The en banc decision reasoned that the private right of action for violations of fourth amendment rights, recognized in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), did not extend to petitioner's action under the fifth amendment. The court did not address the immunity issue or whether the conduct complained of violated the fifth amendment. *Davis* v. *Passman*, 571 F.2d 793 (5th Cir. 1978).

Petitioner's request for a writ of certiorari from this Court was granted on October 30, 1978.

A more complete statement of the case may be found in the petition for certiorari.

QUESTIONS PRESENTED

1. Does the failure of Congress to adopt congressional fair employment procedures preclude normal judicial relief for constitutional violations?

2. Does the speech or debate clause of the United States Constitution immunize a Member of Congress from suit for the firing of an employee on the basis of sex?

INTEREST OF THE AMICI

Amici are Members and employees of the United States House of Representatives. Three of the Members—the Honorable Morris Udall, the Honorable Patricia Schroeder, and the Honorable Charles Rose—and the three congressional employees comprise the House Fair Employment Practices Committee. That

Committee administers the House Fair Employment Practices Agreement, a voluntary agreement signed by 109 Members of the House not to discriminate in employment on the basis of race, color, religion, sex, national origin, age, parental or marital status, or handicap.

All of the *amici* have a strong interest in assuring the existence of fair employment practices for congressional employees. *Amici* are deeply concerned about the adverse impact on such practices that would result if the Fifth Circuit's en banc decision were permitted to stand.

This brief will be limited to those matters, raised by respondent, which are of special interest to *amici,* as Members of Congress and congressional employees: congressional failure to provide an alternative to—or to foreclose—the normally available remedies for constitutional violations, and the inapplicability of speech or debate immunity to sex discrimination in employment.

ARGUMENT

I. CONGRESSIONAL FAILURE TO ADOPT INTERNAL FAIR EMPLOYMENT PROCEDURES DOES NOT PRECLUDE NORMALLY AVAILABLE JUDICIAL RELIEF.

A. The Fair Employment Issue in Congress

Respondent has asserted that Congress is acting to remedy its employment discrimination problems,[1] and that judicial relief is therefore inappropriate. Although there have been a few recent attempts in Congress to establish an effective internal mechanism for handling congressional employees' discrimination complaints,[2] they have been inadequate and unsuccessful. The judicial relief sought by petitioner is the only relief available to vindicate her constitutional rights.

In the last two years there have been three congressional efforts to establish a mechanism to resolve discrimination claims of congressional employees in a manner which would govern all Members.[3] In none of these cases was full consideration on the merits given to the fair employment proposals.

[1] Respondent has claimed that "Congress is moving rapidly toward providing its own remedies" (Resp. at 7) and that "Congress is solving whatever employee relations problems may exist within its halls" (Supp. Resp. at 2). These claims were not raised as a mootness argument and will not be so addressed here.

1. House of Representatives

In September, 1977, the House of Representatives' Commission on Administrative Review (the "Obey Commission") issued a report and a resolution proposing changes in the administrative structure and operations of the House. Commission on Administrative Review, 95th Cong., 1st Sess., Recommendations and Rationales Concerning Administrative Units and Work Management (Including House Resolution 766)

[2] Such attempts have been prompted by congressional failure to extend to its own employees the protection of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* (1976), the primary legislation dealing with the national problem of employment discrimination.

[3] The House Fair Employment Practices Committee, comprised of six of the *amici*, is empowered to handle only those complaints filed against Members of Congress who have signed the voluntary Fair Employment Practices Agreement. *See* Handling of Discrimination Complaints in the Senate, Hearings Before the Senate Committee on Governmental Affairs, 95th Cong., 1st Sess., August 3, 1977 at 25-32. It has been suggested that those Members who have signed the agreement are the Members least likely to discriminate. *Id.* at 32.

(Comm. Print 1977). Included in the numerous recommendations were several concerning fair employment practices. The Obey Commission proposed, *inter alia*, amending House rules to broaden antidiscrimination provisions, establishing an affirmative action recruitment program, and establishing a Fair Employment Practices Panel consisting of three Members of Congress. The panel was to have provided non-binding conciliation services in cases alleging discrimination by Members. *See* H.R. Res. 766, 95th Cong., 1st Sess., §§ 101(6)(b)(8), (9), (10), (11), 504 (1977); Commission on Administrative Review, Recommendations and Rationales, *supra*, at 3, 49-53. These limited proposals were prevented from reaching the House floor when the House defeated, by a 252 to 160 vote, the Rule which would have governed consideration of the Obey Commission's resolution. 123 Cong. Rec. H10819-28 (daily ed. October 12, 1977).

The other attempt to create an effective procedure for resolving complaints of employment discrimination in the House was the introduction of House Resolution 1380 on September 25, 1978. 124 Cong. Rec. H10697 (daily ed. September 25, 1978). That resolution called for implementation of clause 9 of Rule XLIII, an existing House antidiscrimination provision.[4] House Reso-

[4] Clause 9 of Rule XLIII, adopted on January 14, 1975, 121 Cong. Rec. 22 (1975) provides:

> A Member, officer, or employee of the House of Representatives shall not discharge or refuse to hire any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Because of burdensome procedures which prohibit a non-Member from bringing a case before the Committee on Standards of Official Conduct unless three Members of the House have signed letters refusing to bring the case, the Obey Commission described the antidiscrimination section as "all but unenforceable" in explaining its recommendation for a Fair Employment Practices Panel. Commission on Administrative Review, Recommendations and Rationales, *supra*, at 53.

lution 1380 called for the establishment of "a House Fair Employment Relations Board, a House Fair Employment Relations Office, and procedures for hearing and settling complaints alleging violations" of the House Rules' antidiscrimination clause. H.R. Res. 1380, 95th Cong., 2d Sess., § 2 (1978). The resolution was referred to the House Committees on Administration and Rules; neither Committee reported the resolution and the House therefore failed to consider it before adjournment.

2. Senate

Senate Resolution 431, identical to House Resolution 1380, was also not considered by the full Senate, despite hearings revealing extensive employment discrimination in Congress and a favorable report by the Senate Governmental Affairs Committee. *See* Handling of Discrimination Complaints in the Senate, Hearing Before the Senate Committee on Governmental Affairs, 95th Cong., 1st Sess., August 3, 1977, and 2d Sess., February 9, 1978; S. Rep. No. 729, 95th Cong., 2d Sess. (1978). Senate Resolution 431, like its House counterpart, sought to implement the provisions of an antidiscrimination rule which had been adopted with no effective enforcement mechanism.[5] Favorably reported on

[5] Senate Rule L(50), adopted April 1, 1977 as part of a new Code of Official Conduct, 123 Cong. Rec. S5381-406 (daily ed. April 1, 1977), goes into effect on January 3, 1979. It provides:

> No Member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof—
>
> (a) fail or refuse to hire an individual;

April 7, 1978, the Resolution did not reach the floor of the Senate until October 11, 1978, when it was introduced and debated as an amendment to the Full Employment and Balanced Growth Act of 1978 (the "Humphrey-Hawkins Bill"). 124 Cong. Rec. S18206-11, S18226-29, S18235-49, S18250-51, S18278-80 (daily ed. October 11, 1978). Two days later the resolution was withdrawn to facilitate passage of the Humphrey-Hawkins Bill. 124 Cong. Rec. S18873-74 (daily ed. October 13, 1978). The resolution was not reconsidered before adjournment.

Thus, Congress has failed to implement the antidiscrimination policies it has adopted.[6] This Court has clearly held that the fifth amendment provides protection against sex discrimination by the federal government. *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero* v.

(b) discharge an individual; or

(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment

on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.

The Governmental Affairs Committee, in favorably reporting Senate Resolution 431, noted that Rule L "will not be an effective deterrent to employment discrimination unless procedures are established for the resolution of discrimination complaints." S. Rep. No. 729, *supra*, at 5. Many of the people who testified before the Committee commented on the ineffectiveness of an antidiscrimination rule with no means of enforcement. *See, e.g.*, Handling of Discrimination Complaints in the Senate, *supra*, August 3, 1977 at 9 (Testimony of Senator Brooke), 11 (Testimony of Senator Abourezk).

[6] Even had Congress enacted the measures discussed in this brief, petitioner would be unable to avail herself of whatever benefits they might have provided, as respondent is no longer a Member of Congress.

Richardson, 411 U.S. 677 (1973). If petitioner is to have such protection, it will have to come from the courts.

B. Judicial Relief Has Not Been Foreclosed By Congress

1. Recent Senate and House Action

Congress's failure to provide an administrative procedure to handle its employees' complaints of discrimination does not affect the availability of judicial relief for such complaints.

The effect of Senate Resolution 431 on judicial relief was explicitly considered. The Governmental Affairs Committee viewed its proposed procedures as supplementing existing avenues of judicial relief rather than as replacing them or providing additional federal jurisdiction. For instance, the Committee's staff draft of the resolution, presented by Senator Glenn at the February 9, 1978 hearings, contained the following discussion:

> *Question 1.* Is it possible that these remedies might preempt other potentially applicable legal remedies—thus inadvertently establishing an exclusive sanction? Or, are we at least creating an exhaustion of remedies requirement?
>
> Answer. I believe that our intent here is not to limit Federal jurisdiction or to preclude other remedies. All access to the judicial process should continue. However, since courts have recognized the desirability of building an "agency record," and often value in-agency expertise, I believe that we do, by our resolution, create [an] exhaust your remedies requirement before entering court except where the administrative remedy is inadequate.
>
> *Question 2.* Do our procedures act to provide a further basis for Federal jurisdiction?
>
> Answer. Probably not, Senate rules say that a simple resolution relating to internal procedures is

> not "law" so this resolution by itself, gives no immediate entry into court.

Handling of Discrimination Complaints in the Senate, *supra*, February 9, 1978, at 4. *See also id.* at 60-81 (Legal Analysis of Various Questions with Regard to the Draft Resolution, prepared by the Congressional Research Service of the Library of Congress).

Moreover, the hearings and report contain numerous references to the original Fifth Circuit panel's decision in this litigation, recognizing petitioner's cause of action. *See, e.g.,* S. Rep. No. 729, *supra,* at 8; Handling of Discrimination Complaints in the Senate, *supra,* August 3, 1977, at 8-9, 126, 130, and February 9, 1978, at 15, 95, 321-37, referring to *Davis* v. *Passman,* 544 F.2d 865 (5th Cir. 1977). Thus, the Committee considering the resolution was aware of the judicial remedy approved by the Fifth Circuit's original decision and expressed no disapproval or desire to limit its effect. The Senate's failure to consider Senate Resolution 431 because of political considerations related to the Humphrey-Hawkins Bill can not reasonably be interpreted as limiting judicial relief.[7]

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[7] Since none of the three resolutions (S.Res. 431 and H.R. Res. 766 and 1380) was ever considered on its merits, *see* pp. 5-8 *supra,* congressional inaction can not be interpreted as a statement of congressional intent to foreclose judicial remedies for employment discrimination. *See generally* FTC v. Dean Foods Co., 384 U.S. 597, 609-10 and n.11 (1966); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 11 (1942).

There is less explicit evidence regarding the effect of the two House proposals on the availability of judicial relief. The Obey Commission's fair employment proposals were a small part of the Commission's effort to revamp House administration and were accompanied by comparatively little explanatory material. The Commission's focus on the internal operations of the House makes it unlikely that the Commission intended its proposals to affect the availability of judicial relief. House Resolution 1380 was never the subject of hearings, committee reports, or floor debate. *See* pp. 6-7 *supra.* It was, however, identical to Senate Resolution 431 and nothing indicates that it was perceived as having a different effect than the Senate resolution, which was viewed as an internal mechanism, independent of judicial relief. Thus, the House's inaction on these resolutions, to the degree that it can be interpreted at all, can certainly not be viewed as foreclosing judicial relief.

2. Title VII

It should also be noted that the omission of congressional employees from the provisions of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* (1976) does not foreclose an action based on a constitutional claim of sex discrimination. First, in order for a court to conclude that Congress has taken a step as serious as barring access to the courts for violations of constitutional rights, congressional intent must be clear and unambiguous.[8] Silence is neither clear nor unambiguous [9] and, particularly in the absence of an alternative remedy, should not be interpreted as carrying significant implications.

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[8] *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971):

> [W]e have here no *explicit congressional declaration* that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.

(Emphasis supplied.) *See also* Marbury v. Madison, 1 Cranch 137, 163 (1803):

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.

[9] *See* n.7 *supra.*

Second, to interpret Title VII as completely foreclosing judicial relief for congressional employees would be inconsistent with the policy against federal employment discrimination on the basis of race, color, religion, sex, or national origin enunciated by Congress in 5 U.S.C. § 7151 (1976). Congressional employees are considered federal employees for the purposes of that statute. 5 U.S.C. §§ 2101(1), 2105(a)(1)(B). Interpreting Title VII inconsistently with 5 U.S.C. § 7151 would violate the principle that courts should interpret statutes to reconcile apparent inconsistencies, and should give effect to both statutes. *See United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *Wilderness Society* v. *Morton*, 156 U.S. App. D.C. 121, 479 F.2d 842 (1973), *cert. denied*, 411 U.S. 917 (1973). Omission of congressional employees from Title VII means only that they have no access to the specific procedures established by Title VII, and not that those employees have been totally denied judicial relief for violations of their constitutional rights.[10]

Third, this Court has concluded that inclusion in Title VII is not a prerequisite to an action for unconstitutional employment discrimination. In *Hampton* v.

[10] This Court has reviewed Title VII's legislative history and concluded that federal employees were initially excluded because of congressional doubts as to the availability of effective judicial relief against the federal government. Brown v. GSA, 425 U.S. 820, 825 (1976). That conclusion does not support the argument that Congress intended to foreclose any relief that might exist. This Court declined to assess the correctness of the congressional concern about the availability of relief. *Id.* at 828. Certainly, the Court's holding in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), indicates that some of the congressional fears were unfounded. This fact is reflected in Senate references, during consideration of S.Res. 431, to the availability of judicial relief for constitutional violations by the federal government. *See* pp. 9-10 *supra*.

Mow Sun Wong, 426 U.S. 88 (1976), the Court held that aliens had a cause of action under the fifth amendment for employment discrimination by the federal government. Title VII does not protect employees from discrimination on the basis of alienage.[11] Thus, *Hampton* v. *Mow Sun Wong* demonstrates that omission from Title VII does not bar an individual from the access to the courts necessary to effectuate his or her constitutional rights.[12] The holding of *Brown* v. *General Ser-*

[11] Title VII prohibits employment discrimination because of "race, color, religion, sex, or national origin." § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976).

[12] In the Fifth Circuit en banc decision, the court stated, "Implying the cause of action asserted by Davis would have the anomalous result of granting federal employees in the noncompetitive service, whom Congress did not intend to protect, a remedy far more extensive than Congress adopted for federal employees in the competitive service, whom it did intend to protect." Davis v. Passman, 571 F.2d 793, 798 (5th Cir. 1978). That statement reflects several misconceptions. First, it is difficult to understand why the Fifth Circuit described the constitutional remedies available to congressional employees as being "far more extensive" than those provided for by Title VII. Title VII gives a plaintiff access to both administrative and judicial redress, the latter of which may include, but is not limited to, enjoining the unlawful practice, ordering appropriate affirmative action such as the reinstatement or hiring of employees, back pay, and any other equitable relief deemed appropriate. §§ 706, 717 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5, 2000e-16 (1976).

Second, the fact that Congress did not extend Title VII to its employees does not mean that it intended to leave them totally unprotected, no matter how flagrant the constitutional violation, or even that it intended to leave them significantly less protected than other employees. The omission merely means that Congress chose not to use the particular procedures set out in Title VII. *See* pp. 11-12 *supra*.

Third, the Fifth Circuit seems, in its statement, to be assuming that all complaints of federal employment discrimination must be resolved in the same way. It is, however, a well-established principle that a statute need not address all aspects of a given problem. Railway Express Agency v. New York, 336 U.S. 106 (1949).

vices Administrationtion, 425 U.S. 820 (1976), is not inconsistent with this result. Although *Brown* held that § 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, is the exclusive judicial remedy for employment discrimination claims by those federal employees covered by the Act, *Brown* did not address the case of those, such as congressional employees, for whom the Act provides no remedy.

Congress has failed to provide meaningful internal procedures by which to resolve employment discrimination complaints against its Members. There is no indication—in the record or otherwise—that it will do so in the near future. Therefore, in the absence of other remedial legislation, actions such as petitioner's are critical to the ability of congressional employees to enforce their fifth amendment rights.

II. THE SPEECH OR DEBATE CLAUSE DOES NOT IMMUNIZE MEMBERS OF CONGRESS FROM SUIT FOR DISMISSALS OF CONGRESSIONAL STAFF ON THE BASIS OF SEX.

Respondent has raised sovereign and official immunity as absolute defenses to this action.[13] The district court's opinion and the original decision of the Fifth Circuit held both such defenses clearly inapposite and neither merits further discussion.[14] *Amici* will therefore

[13] If respondent is entitled to qualified immunity, *see* Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974), then petitioner would still be entitled to a trial on the merits. Imbler v. Pachtman, 424 U.S. 409, 419 nn.13, 14 (1976).

[14] Petitioner's claim for damages is not one which would impinge upon the United States Treasury, but rather is one against respondent personally. Therefore, no question of sovereign immunity is presented. The doctrine of absolute official immunity is similarly unavailable. The common law privilege of absolute immunity for the legislative acts of legislators was incorporated into the speech

address the sole theory of immunity arguably available to respondent in support of his motion to dismiss, *i.e.*, that provided by the speech or debate clause of the United States Constitution.

As Members of Congress and the House of Representatives Fair Employment Practices Committee, *amici* do not believe that legislative immunity for unconstitutional dismissals of congressional staff employees is necessary for the proper functioning of Congress. There exists no legal or other reason for the Court to extend this doctrine beyond the legitimate legislative activities it was intended to protect to administrative functions which are merely incidental to the legislative process. Such an extension would be singularly inappropriate in a case such as this which involves a substantial intrusion upon important rights.

This Court has recognized that the immunity provided by the speech or debate clause is limited. The purpose of the clause is to protect the Members of Congress "against prosecutions that directly impinge upon or threaten the legislative process." *Gravel* v. *United States*, 408 U.S. 606, 616 (1972), *reh. denied*, 409 U.S. 902 (1972). It protects solely those actions "in the sphere of legitimate legislative activity," *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951), "[i]n short, . . . things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1880).

or debate clause of the United States Constitution, Tenney v. Brandhove, 341 U.S. 367, 372-73 (1951), and is coterminous with the immunity provided by that clause. *See* Doe v. McMillan, 412 U.S. 306, 324 (1973) (Members of Congress are absolutely immune when legislating but enjoy no absolute immunity when they act outside the legitimate legislative process). *See also* Butz v. Economou, 46 U.S.L.W. 4952 (U.S. June 29, 1978).

The speech or debate clause was not "written into the Constitution simply for the personal or private benefit of Members of Congress." *United States* v. *Brewster*, 408 U.S. 501, 507 (1972). It was not intended to immunize legislators against all litigation, but only that connected with a legislative act and the integrity of the legislative process. Nor was the clause intended to grant legislators an unrestricted immunity from prosecution for all acts performed while in office but only to ensure the independence of the legislative branch. Consequently, courts have refused to extend its reach to activities incidental to performance of strictly legislative tasks, *e.g.*, to actions taken in running a congressional office.[15]

The respondent therefore errs in suggesting that since the work of congressional aides may be related to

[15] Several authorities hold that suits against Members of Congress and their aides arising out of activities which are marginally related to the legislative process are not barred by the speech or debate clause. *See* Gravel v. United States, 408 U.S. at 625 (public dissemination of materials gathered by committees); United States v. Brewster, 408 U.S. at 512-16 (issuing news releases, delivering speeches outside Congress and making appointments with government agencies); United States v. Johnson, 383 U.S. 169, 172 (1966) (contacts with administrative agencies and executive officials with respect to the administration of federal statutes); Hutchinson v. Proxmire, Nos. 77-1677, 77-1755, slip op. at 625 (7th Cir. June 30, 1978) (defamatory remarks in public interviews concerning wasteful government spending); United States ex rel. Hollander v. Clay, 420 F.Supp. 853, 855-56 (D.C. Cir. 1976) (making of vouchers for travel connected with representing and communicating with a constituency); Hoellen v. Annunzio, 348 F.Supp. 305, 314 (N.D. Ill.), *aff'd*, 468 F.2d 522, 527 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973) (use of the franking privilege). *See generally* United States v. Gillock, No. 77-5335 (6th Cir. Nov. 1, 1978). These incidental legislative activities for which immunity has been denied are certainly more closely associated with the legislative process than the discriminatory discharging of a staff employee.

the functioning of the legislative process, the decision of a Member of Congress to hire or discharge a staff member is a legislative act immune from judicial scrutiny under the speech or debate clause. Resp. at 5. If an aide performs a task which is intimately related to the legislative function, such as helping a Member conduct committee hearings, then he should be cloaked with legislative immunity for that act. *See Gravel* v. *United States*, *supra*. However, the hiring or discharge of such an employee in itself is not an activity "essential to legislating" or an "integral part" of the legislative process. *See id.* at 621, 625. Absent such an intimate relationship with the legislative process, an act may not be considered immune under the speech or debate clause.

That the hiring and firing of congressional employees may be tangentially related to the legislative process is immaterial. This Court has made it clear that not "everything that relate[s] to the office of a Member [is] shielded by the Clause. Quite the contrary . . . only acts generally done in the course of the process of enacting legislation [are] protected." *United States* v. *Brewster*, 408 U.S. 501, 513-14 (1972). As was observed in *Brewster*,

> In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process . . . . Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to relate to the legislative process . . . . In every case thus far before this Court, the speech or debate clause has been limited to an act which was clearly a part of the legislative process—the *due* functioning of the process.

Id. at 515-16 (emphasis in original). Thus, the clause does not prohibit inquiry into conduct merely because it has a nexus to legislative functions or because that conduct is casually or incidentally related to legislative affairs.

Amici recognize the strong interest of Congress in ensuring that its Members possess broad discretion in the hiring and dismissal of their staff employees. That interest is amply protected by 2 U.S.C. § 92, which permits Members of Congress to remove personal staff employees "at any time . . . with or without cause." That interest is not sufficient, however, to warrant the extension of a constitutional immunity, granted for a limited purpose, to dismissals of staff on sexually discriminatory or any other constitutionally impermissible grounds.

To accept respondent's assertion that he has absolute immunity from claims that he violated the constitutional rights of his staff members in the hiring or firing process would extend immunity far beyond legislative activities to actions which a Member of Congress takes not as part of the legislative process but as an ordinary citizen, in this case as an employer. The speech or debate clause absolutely protects the legislative process, not the individual legislator. That process is not endangered by refusing to extend immunity to an unconstitutional dismissal of a congressional employee. Immunity for such actions is not only unnecessary to preserve the integrity of the legislative process, but actually subverts the intent of the framers in providing this constitutional immunity by granting legislators the unlimited privilege to flout indiscriminately constitutional rights which they have sworn to uphold and have caused to be enforced against every other segment of the American public.

The speech or debate clause must be construed not in isolation but in the light of the entire constitutional scheme. When the action complained of infringes significant constitutional rights, as here, this Court should interpret the scope of the activities protected by that clause narrowly and not in the expansive sense advocated by respondent.

Amici neither desire nor find desirable the extension of legislative immunity to the unconstitutional dismissal of congressional staff employees. More important, they disagree with the contention that such immunity is essential to the proper functioning of the legitimate legislative process. Respondent has entirely failed to demonstrate that the broad application of speech or debate immunity he advocates would ensure the independence of that process rather than merely provide individual legislators with the freedom to discriminate on the basis of sex. Therefore, his claim of speech or debate immunity should be denied.

CONCLUSION

For the foregoing reasons, the en banc decision of the United States Court of Appeals for the Fifth Circuit should be reversed, and the case remanded to the district court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the foregoing Brief for the Honorable Morris Udall, *et al.*, *Amici Curiae*, were mailed, first class mail, postage prepaid, this 14th day of December, 1978 to each of the following:

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APPENDIX

APPENDIX

LAW OFFICES
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December 4, 1978

Ms. Sana F. Shtasel
Covington & Burling
888 16th Street, N.W.
Washington, D.C. 20006

Re: Shirley Davis v. Otto E. Passman
No. 78-5072

Dear Ms. Shtasel:

Pursuant to our telephone conversation, I am writing to request your consent to our filing a brief *amici curiae,* in the United States Supreme Court, on behalf of the Hon. Morris Udall, the Hon. Patricia Schroeder, the Hon. Charles Rose, the Hon. George Miller, the Hon. Robert Carr and other members of Congress, and Carla Kish, Winnie Burrell and Bruce Kriegman, in the above-captioned case.

If you do consent as requested in this letter, please indicate by signing below.

Sincerely,

/s/ CYNTHIA A. LEWIS
Cynthia A. Lewis

On behalf of petitioner, I consent to the above.

/s/ SANA F. SHTASEL
Sana F. Shtasel

/s/ PETER BARTON HUTT
Peter Barton Hutt
Attorneys for Petitioner

LAW OFFICES
HUDSON, POTTS & BERNSTEIN

December 4, 1978

Honorable Michael Rodak, Jr., Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Re: Shirley Davis
Vs.
Otto E. Passman

Dear Mr. Rodak:

On behalf of Otto E. Passman, this is to advise that the undersigned has no objection to the filing of a brief as an amicus curiae by (1) The Honorable Morris Udall, Charles Rose, Patricia Schroeder, George Miller, Robert Carr and the Fair Employment Practices Committee and (2) The American Civil Liberties Union.

Very truly yours,

HUDSON, POTTS & BERNSTEIN
/s/ A. RICHARD GEAR
A. Richard Gear